No. 76-1491

In the Supreme Court of the United States

OCTOBER TERM, 1977

ANTHONY M. NATELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
JOSEPH S. DAVIES, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 553 F. 2d 5. The opinion of the district court (Pet. App. C) is not yet reported. The opinion of the court of appeals on direct appeal (Pet. App. D) is reported at 527 F. 2d 311.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on March 28, 1977. The petition for a writ of certiorari was filed on April 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in denying petitioner's motion to vacate his sentence under 28 U.S.C. 2255 by relying in part on the fact that it had considered and rejected the same claims on direct appeal.

2. Whether, in the circumstances of this case, the district court properly denied petitioner's claims without an evidentiary hearing.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of willfully and knowingly making and causing to be made false and misleading statements with respect to material facts in a proxy statement required to be filed with the Securities and Exchange Commission, in violation of Section 32(a) of the Securities Exchange Act of 1934, 48 Stat. 904, as amended, 15 U.S.C. 78ff(a). He was sentenced to serve 60 days of a one year term of imprisonment, the balance to be served on probation, and was fined $10,000 (Pet. App. 3d). The court of appeals affirmed (Pet. App. D), and this Court denied certiorari (425 U.S. 934).

1. On April 23, 1976, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255 and for a new trial, pursuant to Rule 33, Fed. R. Crim. P., alleging that (1) the government had failed to prove the falsity of the proxy statement he was convicted of filing and (2) the prosecutor had presented an "erroneous version" of the facts in his summation to the jury. The background of these claims is as follows: Petitioner, a certified public accountant and a partner in the accounting firm of Peat, Marwick, Mitchell & Company ("Peat"), was the engagement partner for Peat's audits of the financial statements of National Student Marketing Corporation ("NSMC"). In that capacity he helped prepare a proxy statement filed by NSMC with the

Securities and Exchange Commission in connection with a special meeting of NSMC stockholders that was held in the fall of 1969 to consider issuing additional shares of common stock and approving proposed mergers with other companies. Included in the proxy statement were unaudited financial statements for the first nine months of NSMC's fiscal year 1969. The statements as prepared by NSMC reflected an unbilled sale to the Pontiac Division of General Motors in the amount of $1.2 million. Petitioner had indicated that he might not permit the Pontiac sale to remain on the books unless additional information were provided to show that there was a firm commitment (Tr. 653, 672; Natelli Exh. H).[1]

Petitioner, other Peat employees, and NSMC officials gathered in New York on the night of August 14, 1969, at the Pandick Press, which was to print the proxy statement the next day. At about 3:00 a.m. on August 15, petitioner told NSMC's president, Cortes Randell, that the Pontiac sale could not be included in the nine-month earnings statement. Randell responded that NSMC had an unbooked but firm commitment from Eastern Airlines in a comparable amount attributable to the same nine-month period (which had ended more than two months earlier). An NSMC salesman arrived at the printing plant several hours later with a letter from Eastern Airlines dated August 14, 1969, purporting to

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[1]Transcript and exhibit references are to the record of petitioner's trial.

The Pontiac sale had been booked as of February 28, 1969, the close of the first six months of NSMC's fiscal year 1969, although the letter purporting to evidence the sale was dated April 28, 1969, two months after the close of that period, and stated only that Pontiac was then "planning to implement * * * [NSMC] proposals that would result in gross billings of $1,200,000" (Govt. Exh. 12). The booking of the Pontiac sale occurred at approximately the same time as the write-off of $1 million of 1968 sales.

confirm an $820,000 oral commitment ostensibly made on May 14, 1969, two weeks before the end of the nine-month period (Pet. App. 10d-11d). On direct appeal the court of appeals characterized this event as follows (*id.* at 15d-16d; footnote omitted):

> The Eastern contract was a matter for deep suspicion because it was substituted so rapidly for the Pontiac contract to which Natelli had objected, and which had, itself, been produced after the end of the fiscal period, though dated earlier. It was still another unbilled commitment produced by [NSMC] long after the close of the fiscal period. Its spectacular appearance, as Natelli himself noted at the time, made its replacement of the Pontiac contract "weird." The Eastern "commitment" was not only in substitution for the challenged Pontiac "commitment" but strangely close enough in amount to leave the projected earnings figures for the proxy statement relatively intact. [NSMC] had only time logs of a salesman relating to the making of the proposals but no record of expenditures on the Eastern "commitment," no record of having ever billed Eastern for services on this "sale," and not one scrap of paper from Eastern other than the suddenly-produced letter. * * *

Petitioner concluded that the purported Eastern commitment should be booked. "When the proxy statement was printed in final form, the Pontiac 'sale' had been deleted [from the nine-months' earnings statement], but the Eastern 'commitment' had been inserted in its place" (Pet. App. 11d).

The proxy statement, as filed with the Securities and Exchange Commission on September 30, 1969, reflected, for the nine-month period ending May 31, 1969, consolidated net earnings of approximately $700,000 (Govt. Exh. 25, p. 21). As the court of appeals stated, "[a] true

disclosure, which was not made, would have shown that without these unbilled receivables, [NSMC] had no profit in the first nine months of [fiscal] 1969" (Pet. App. 11d).

2. In his motions for post-conviction relief, petitioner alleged that the government had failed to prove the falsity of the Eastern commitment and had presented an "erroneous version" of the facts to the jury by arguing that one of the indications that the commitment was false was its sudden production at 3:00 a.m. at the Pandick Press. Petitioner based the latter claim on the fact that Randell, NSMC's president at the time of the proxy statement, had subsequently testified as a government witness in criminal proceedings against Thomas Mullen, an executive of Eastern Airlines, that NSMC had made a proposal to Eastern prior to the end of May 1969 and that Mullen, having expressed a desire to proceed with the program, followed up with the letter upon which petitioner allegedly relied. Petitioner contended that, in view of Randell's testimony at Mullen's trial, which occurred 11 months after petitioner had been found guilty, the government must have known the facts and must therefore have deliberately misstated that the commitment letter was "phony".

3. The district court denied petitioner's motions without holding an evidentiary hearing. It concluded that petitioner's claim that the government had failed to prove the falsity of the proxy statement had been rejected on direct appeal and that "[f]rom a review of the evidence in this area, the argument has not gained merit in the ensuing months" (Pet. App. 4c). It also found that Randell's testimony at Mullen's trial, which petitioner relied on to support his assertion that the prosecutor had knowingly misstated the record, did not amount to "newly discovered evidence"

within the meaning of Rule 33, Fed. R. Crim. P., and did not even contradict the statements made during the government's summation at petitioner's trial (*id.* at 3c). The court of appeals affirmed (Pet. App. A).

ARGUMENT

1. Petitioner contends (Pet. 14-21) that, in rejecting the claim in his Section 2255 motion that the evidence of the falsity of the Eastern contract was insufficient, the court of appeals erred in relying on its previous determination of the identical contention on direct appeal. Petitioner asserts that this approach violates the Court's holding in *Sanders* v. *United States*, 373 U.S. 1, that the doctrine of *res judicata* is inapplicable to collateral attacks on a conviction and that on collateral review "controlling weight" should be given to a claim that has previously been denied only if the ends of justice would not be served by reaching the merits of the subsequent application. *Id.* at 7-8, 15.

Contrary to petitioner's contentions, the decision below fully accords with settled principles of review under Section 2255. As the Court observed in *Kaufman* v. *United States*, 394 U.S. 217, 227 n. 8, "where the trial or appellate court has had a 'say' on a federal prisoner's claim, it may be open to the §2255 court to determine that on the basis of the motion, files, and records, 'the prisoner is entitled to no relief.' " This is precisely the course followed by the lower courts here. Notwithstanding petitioner's assertions, those courts did not view their earlier decisions as having conclusively barred relitigation of petitioner's contention; rather, each court determined, after a review of the record, that petitioner had failed to submit any reasons warranting a different result.[2]

[2] We note moreover, that petitioner's challenge to the sufficiency of the evidence is not cognizable on collateral attack. See, *e.g.*, *United States* v. *Osborn*, 415 F. 2d 1021, 1023 (C.A 6) (*en banc*), certiorari denied, 396 U.S. 1015. The court of appeals' decision affirming

Thus, the district court rejected petitioner's claim only after concluding that "[f]rom a review of the evidence in this area, the argument has not gained merit in the ensuing months" (Pet. App. 4c), while the court of appeals rejected the claim in reliance upon its decisions in *Meyers* v. *United States*, 446 F. 2d 37, 38 (C.A. 2), and *United States* v. *Granello*, 403 F. 2d 337, 338 (C.A. 2), certiorari denied, 393 U.S. 1095, which held that "compelling reasons" or "extraordinary circumstances" must be present to justify reconsideration of an issue already determined on appeal. See also *Scott* v. *United States*, 545 F. 2d 1116, 1117 (C.A.8), certiorari denied, No. 76-6073, February 22, 1977; *Egger* v. *United States*, 509 F. 2d 745, 748 (C.A. 9), certiorari denied, 423 U.S. 842; *Stephan* v. *United States*, 496 F. 2d 527, 529 (C.A. 6), certiorari denied *sub nom. Marchesani* v. *United States*, 423 U.S. 861; *Ugarte-Veizaga* v. *United States*, 452 F. 2d 1194, 1195 (C.A. 5).[3]

petitioner's conviction convincingly demonstrates that this is not a case in which the record is devoid of "any relevant evidence as to a critical element of the offense charged." *Vachon* v. *New Hampshire*, 414 U.S. 478, 480. The absence of "any relevant evidence" presumably would elevate an insufficiency claim into a constitutional claim rooted in the Due Process Clause, materially affecting access to collateral review.

[3] Since the court of appeals did not conclude that it was barred by *res judicata* from reconsidering petitioner's sufficiency of the evidence claim, petitioner's allegation of a conflict with the decisions of this Court and of other circuits is insubstantial. In *Davis* v. *United States*, 417 U.S. 333, the Court did not suggest that on collateral attack a court must always give plenary consideration to a claim that had been fully considered and rejected on direct appeal. To the contrary, *Davis* concerned "the availability of collateral relief from a federal criminal conviction based upon an intervening change in substantive law" (*id.* at 334). Indeed, in holding that collateral relief was available in that situation, the Court relied on its statement in *Hill* v. *United States*, 368 U.S. 424, 428, that relief under Section 2255 was limited to "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." Similarly, each of the other cases on which petitioner relies expressly recognized that the courts of appeals need not

2. Petitioner contends (Pet. 21-27) that the district court erred in failing to hold an evidentiary hearing to determine whether Randell's subsequent testimony at the Mullen trials showed that the government's characterization of the Eastern Airlines commitment as "phony" in its opening and closing arguments at petitioner's trial was a misrepresentation.[4] An evidentiary hearing is not required under 28 U.S.C. 2255, however, if the files and records in a case sufficiently show that the motion to vacate sentence is without merit. *Fontaine* v. *United States*, 411 U.S. 213, 215. The court of appeals correctly concluded that the files and records showed that petitioner was not entitled to collateral relief (Pet. App. 5a-6a):

> [Randell] was an admitted swindler and briber who was a hostile witness in the subsequent proceedings. As we have indicated, he was never called to corroborate the defense's version at Natelli's trial. His later admissions, if anything, fortify the position of the government that the Eastern commitment was in fact totally fraudulent. It was produced by reason of bribes to Mullen and was accompanied by a "side agreement"

consider under Section 2255 a claim that had been rejected on direct appeal unless the ends of justice so required. See *Laughlin* v. *United States*, 474 F. 2d 444, 452 (C.A. D.C.), certiorari denied, 412 U.S. 941; *Jack* v. *United States*, 435 F. 2d 317, 319 (C.A. 9), certiorari denied, 402 U.S. 933; *Tannehill* v. *Fitzharris*, 451 F. 2d 1322, 1324 (C.A. 9); *Stephens* v. *United States*, 341 F. 2d 100, 101 (C.A. 10).

[4]Petitioner presented this claim in his petition for a writ of certiorari after the affirmance of his conviction. In our brief in opposition to that petition (p. 30), we observed that since petitioner had not raised this argument in the lower courts, "[t]he proper procedure is for petitioner to present his contentions to the district court in a motion for a new trial under Rule 33, Fed. R. Crim. P., or a motion to vacate his sentence under 28 U.S.C. 2255." This statement, of course, did not indicate that the government believed petitioner's claim to be meritorious or to require an evidentiary hearing.

> permitting Eastern to cancel on 30 days notice prior to December 31, 1969. Randell in fact pleaded guilty to conspiracy and fraud prior to Natelli's trial and, as the court found below, the transcripts of the allocutions of Randell and Kelly (a co-defendant) were available to Natelli on trial. These transcripts disclosed the existence of the "side agreement," making Natelli's argument that both he and his jury were unaware of this possible flaw in the Eastern commitment ring hollow. There is no claim here of suppression of evidence by the government or perjury by government witnesses. Upon analysis, Natelli's argument is reduced to the claim that he is entitled to a new trial to produce the testimony of Randell which in our view is at best questionable, was previously available and in any event would not be of any significant assistance to Natelli.

Although petitioner asserts that government counsel may have made several misleading statements to the jury in his closing argument, the district court found that "[n]o real contradictions appear" between the prosecutor's summation and Randell's testimony 11 months later (Pet. App. 3c). Furthermore, it is abundantly clear —and petitioner does not dispute— that the summation accurately reflected the proof adduced at *petitioner's* trial.[5] The government's closing argument was therefore unlike that condemned in *Miller* v. *Pate*, 386 U.S. 1, and was well within permissible

[5]A detailed outline of the evidence at trial supporting the government's version of the facts argued to the jury concerning the Eastern commitment is presented at pp. 61-96 of the government's brief in the court of appeals, a copy of which we are lodging with the Clerk of this Court.

bounds. See *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 646-648.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
JOSEPH S. DAVIES, JR.,
Attorneys.

JULY 1977.

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[6] *Fontaine* v. *United States*, 411 U.S. 213, *Machibroda* v. *United States*, 368 U.S. 487, and *Blackledge* v. *Allison*, No. 75-1693, decided May 2, 1977, upon which petitioner relies (Pet. 26), each involved detailed factual allegations, not rebutted by the record, that a guilty plea had been unconstitutionally induced—allegations that could only be resolved after an evidentiary hearing and that, if correct, would unquestionably have entitled the defendant to relief under Section 2255. By contrast, an evidentiary hearing was unnecessary here because the voluminous record contained an adequate basis for the district court to determine whether petitioner's allegations were accurate and, if so, whether they would warrant collateral relief from his conviction.